No. 91-1762

FILED
MAR 19 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REGIONAL CONSTRUCTION COMPANY, ET AL.,
Petitioners,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

W. STANWOOD WHITING,
DIRSKA & LEVIN,
7135 Minstrel Way,
Suite 302,
Columbia, Maryland 21045,
(301) 621-8855,
Counsel for Petitioners.

THE DAILY RECORD COMPANY, 11 EAST SARATOGA STREET, BALTIMORE, MD 21202

QUESTION PRESENTED

Does a non-federal administrative agency commit reversible error under the due process clauses of the 5th and 14th amendments to the United States Constitution in its conduct of proceedings in which issues of substantial rights would be adjudicated, by providing defective notice to petitioners of the prehearing conference and serving neither notice of the actual hearing nor prehearing order on petitioners, in violation of applicable statutes and regulations, and rescinding, only after the hearing had begun, previous rulings that barred petitioners from participating?

CERTIFICATE REQUIRED BY RULES 14 AND 29.1

The other parties to the proceeding in the District of Columbia Court of Appeals, whose judgment is sought to be reviewed, are Michael D. Baker, intervenor below, who was the claimant in the proceedings before the District of Columbia Department of Employment Services, which was the named respondent below.

Regional Construction Company, petitioner below, has no parent or subsidiary company. Hartford Accident and Indemnity Company, the other petitioner below, is a subsidiary of ITT and has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

Question Presented For Review i

Certificate of Parties to the Proceeding in the Lower Court. ii

Table of Contents iii

Table of Authorities. iv

Opinions by Court and Administrative Agencies v

Jurisdictional Statement vii

Constitutional Provisions, Statutes and Regulations. vii

Statement of the Case. xi

Argument 1

Appendix . . . . . .

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U. S. Constitution, Amendment V..... vii

U. S. Constitution, Amendment XIV
Section 1..... viii

Armstrong v. Manzo, 380 U.S. 545
(1965)..... 10

Greene v. Lindsey, 456 U.S. 444
(1982)..... 2, 4

Morton v. Ruiz, 415 U.S. 199
(1974).....27

Mullane v. Central Hanover Bank & Trust
Co., 339 U.S. 306 (1950).....24

Tulsa Professional Collection Services v.
Pope, 484 U.S. 478 (1988).....14

STATUTES

D.C. Code §36-303(a).....16
D.C. Code §36-320(c).....10, 21
D.C. Code §36-320(d)..... 3, 9
D.C. Code §1-1509(a).....10, 21

RULES

7 DCMR § 222.1.....4, 10
7 DCMR § 222.2.....8
7 DCMR § 222.5.....5

OPINION BY DISTRICT OF COLUMBIA COURT OF APPEALS AND ADMINISTRATIVE AGENCIES

Review is sought of the judgment of the District of Columbia Court of Appeals, appearing with its opinion at 600 A.2d 1077 (D.C. 1991), affirming the decision of the Director, District of Columbia Department of Employment Services, issued September 10, 1990, which affirmed the compensation order issued by an hearings and appeals examiner of the department on January 11, 1989.

Neither the decision of the Director nor the compensation order were reported officially or unofficially. The opinions and orders of the Court of Appeals and the administrative agency appear in the appendix.

The record in the lower court is not paginated, except the transcript of the hearing proceedings on January 11, 1989, references to which are designated "HR__." The notation "CX 3" refers to claimant's hearing exhibit No. 3. The employer's single hearing exhibit is designated "EX 1."

JURISDICTIONAL STATEMENT

The judgment of the District of Columbia Court of Appeals of which review is sought was entered on December 20, 1991. Jurisdiction to review this judgment is conferred on this Court by writ of certiorari pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

U.S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to

be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D.C. Code §1-1509 (a).

In any contested case, all parties thereto shall be given reasonable notice of the afforded hearing by the Mayor or the agency, as the case may be. The notice shall state the time, place, and issues involved, but if by reason of the nature of the proceeding, the Mayor or the agency determines that the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, it shall be fully stated as soon as practicable, an opportunity shall be afforded all parties to present evidence and argument with respect thereto.

D.C. Code §36-303 (a).

This chapter shall apply in respect to the injury or death of an employee of an employer as defined in paragraphs (9) and (10) of §36-301, irrespective of the place where the injury or death occurs, provided that at the time of such injury or death this employment is principally localized in the District of Columbia. . .

D.C. Code §36-320 (c).

If a hearing on such claim is ordered, the Mayor shall give the claimant and other interested parties at least ten days notice of such hearing, served personally upon the claimant and other interested parties by registered mail or certified mail.

D.C. Code §36-320 (d).

At such hearing the claimant and the employer may each present evidence in

respect of such claim and may be represented by any person authorized in writing for such purpose.

D.C. Municipal Regulations §222.1.

The Office shall furnish each of the interested parties or their representatives with a copy of the pre-hearing statement form.

D.C. Municipal Regulations §222.2.

Each party shall, within twenty-one (21) working days after receipt of the pre-hearing statement form, complete it and return it to the Office and serve copies on all other parties. Extensions of time for good cause may be granted by the Office.

D.C. Municipal Regulations §222.5.

A party's failure to submit a prehearing statement or failure to raise relevant

issues in this statement may result in the denial by the Hearing Attorney or Examiner of motions relevant to the issues.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the District of Columbia Court of Appeals. The controversy arises from a claim for workers' compensation benefits filed by Michael D. Baker with the District of Columbia Department of Employment Services for injuries sustained while employed by Regional Construction Company. The original compensation order was issued by a hearings and appeals examiner on January 11, 1989, finding, inter alia, that the District had jurisdiction over the claim and that certain workers' compensation benefits were due from petitioners, the Company and its insurance carrier, Hartford Accident & Indemnity Company. Upon review by the Director, Department of Employment

Services, the compensation order was affirmed. Petitioners then sought review in the District of Columbia Court of Appeals, which affirmed the decision of the Director. From that order, petitioners seek a writ of certiorari from this Court.

The federal question sought to be reviewed pertains to the Department's asserted deprivation of due process protections of fair and adequate notice of hearing proceedings. This issue was raised informally by petitioners' request to postpone the hearing on January 9, 1989, and again at the hearing itself on January 11, 1989; the hearing examiner denied the postponement (Appx. 38-40). The hearing examiner eventually issued a compensation order on February 16, 1989 (Appx. 52-53), and petitioners timely

sought review by the director of the Department on March 20, 1989 (Appx. 13), again asserting "that the Hearing Examiner erred in proceeding with the formal hearing in the absence of requisite statutory notice... especially where employer was unaware of the pre-hearing conference and had not retained counsel until after the conference" (Appx. 18). In a decision issued September 10, 1990, the director affirmed the compensation order, and again petitioners sought further review, inter alia, on the grounds of lack of fair and adequate notice, in the District of Columbia Court of Appeals (Appx. 5-11).

ARGUMENT

A non-federal administrative agency committed reversible error under the due process clauses of the 5th and 14th amendments to the United States Constitution in its conduct of proceedings in which issues of substantial rights would be adjudicated, by providing defective notice to petitioners of the prehearing conference and serving neither notice of the actual hearing nor prehearing order on petitioners, in violation of applicable statutes and regulations, and rescinding, only after the hearing had begun, previous rulings that barred petitioners from participating.

This Court long has protected the due process requirements of reasonable notice and opportunity for a meaningful hearing

where substantial prejudice to a protected property interest has been established. The Court has spoken clearly and unhesitatingly as to the application of these due process requirements in a myriad of settings, occasionally with some difference of opinion as to their applicability to specific instances, but with uniformity as to the requirement of prompt and certain notice of proceedings and the general requirement of a hearing before the taking of property, e.g., Greene v. Lindsey, 456 U.S. 444 (1982).

The Court has had few occasions, however, to consider the specific applicability of these standards of constitutionally required fair and reasonable notice to the quasi-adjudicatory proceedings of non-federal administrative agencies, despite the

growth in number, size and authority of such entities in recent years. That this Court's explicit delineation of the due process constraints required of such agencies is desirable and in the public interest is suggested by the conduct of the proceedings in the case at bar by the District of Columbia Department of Employment Services (hereinafter sometimes "DOES").

Claims for workers' compensation benefits were filed both with DOES and in Maryland by Michael D. Baker against petitioners, the employer and its insurance carrier. Claimant's attorneys incorrectly apprised DOES that the attorneys representing petitioners in Maryland also represented petitioners before DOES. DOES, apparently adapting this error, sent the Maryland attorney a

copy of a notice of prehearing conference without serving either petitioner (HR 11; Appx. 3-4).

The statute governing appearance of counsel before DOES specifically requires a written authorization. "At such hearing ...the employer may ...present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose." D.C. Code §36-320 (d). Moreover, the agency's own regulations make explicitly clear that both the employer and its insurance carrier are entitled to service of a prehearing statement form. "The Office shall furnish each of the interested parties or their representatives with a copy of a prehearing statement form." 7 DCMR §222.1. The prehearing notice, however, misdirected by DOES, did not

reach petitioners. "Of course, the reasonableness of the notice provided must be tested with reference to the existence of 'feasible and customary' alternatives and supplements to the form of notice chosen," Greene v. Lindsey, supra, at 444; compare, id., O'Connor, J., dissenting, at 460, "...the Court is unable, on the present record, to evaluate the risks that notice mailed...might fail due to loss [or] misdelivery..."

Because the petitioners, the actual parties against whom the claim for benefits was made, were unaware of the pendency of the prehearing conference, neither appeared for it, precipitating the hearing examiner's invocation of a default procedure (Appx. 4). "A party's failure to submit a prehearing statement or failure to raise relevant issues in the

statement may result in the denial by the Hearing Attorney or Examiner of motions relevant to the issue." 7 DCMR §222.5.

DOES, however, failed to serve a copy of the prehearing order or any notice that a hearing was scheduled. DOES also sent petitioners no notice of its intention to bar them from offering evidence. Thus, even after counsel ultimately was retained to represent petitioners' interests, they had no notification as to the matters at issue, discovery procedures available, the scope of admissible evidence or any particulars of the nature of the hearing which would determine the claimant's entitlement vel non to District workers' compensation benefits for a period of over two years.

Yet the agency, which had remained steadfastly mute toward the petitioners

prior to the hearing, contacted the attorney for claimant a few days before the scheduled hearing to inquire as to "the status of this case...specifically had he had any communications with the attorney for the Employer/Carrier" (HR 6). As of the very day before the scheduled hearing, when petitioners' counsel reached the hearing examiner (in a conference call with claimant's attorney) to reiterate the lack of notice and to request that the hearing be postponed, the agency's response was that the hearing definitely would proceed "as scheduled, specifically for ex parte proof," (Appx. 38) precluding the admission of any evidence by petitioners. The next day, after the actual hearing had begun, the hearing examiner ultimately reversed himself and ruled that the petitioners could offer

evidence. This was a meaningless gesture in that the agency had twice reiterated its ruling that the petitioners could not offer evidence, as recently as the afternoon of the day before (HR 7), so that petitioners had no evidence at hand to offer, even had DOES reasonably informed them of the specific nature and issues of the hearing. The agency too was unmoved by the claimant's failure to particularize the issues by serving a copy of the prehearing statement on petitioners. "Each party shall, within twenty-one (21) working days after receipt of the prehearing statement form, complete it and return it to the Office and serve copies on all other parties..." 7 DCMR 222.2.

The District of Columbia Court of Appeals acknowledged that "the notice of

the hearing was defective," slip op. 3,5 (Appx. 3), but held that any resulting error was harmless because of lack, in the court's view, of resulting prejudice. The lower court's error here was two-fold. First, the agency's failure to accord reasonable due process to the petitioners certainly was not limited to the lack of notice of hearing. It was merely an example.

In discerning no prejudice, the Court of Appeals held that "petitioners received actual notice of the prehearing conference, had advance knowledge of the formal hearing, and participated in it," ibid. Petitioners did not have actual notice of the prehearing conference. The agency erroneously sent the notice of prehearing conference to a law firm which had not entered its appearance on

petitioners' behalf under D.C. Code §36-320 (d) and which in fact was not representing petitioners in the District of Columbia (although the firm was representing petitioners in a claim for Maryland benefits) (CX 3). This notice was sent neither to the employer nor its insurer nor anyone authorized to act on their behalf, although the agency did serve both the claimant himself and claimant's attorneys.

Providing notice to Regional Construction, a company situate within the District, or at least upon its insurance carrier, could have posed no unreasonable burden upon DOES. Yet, until after the agency had determined to proceed ex parte against them, petitioner had not "the slightest inkling of the pendency of these ...proceedings," Armstrong v. Manzo, 380

U.S. 545 (1965), 548, and as in Armstrong, the constitutionally infirm failure of notice could not be cured by the mere expedient of affording petitioners an eleventh hour gesture purporting to allow them to "participate" in a hearing, id., 550-551. Despite the statutory requirement in the D.C. workers' compensation act requiring specific personal service of any hearing notice, D.C. Code §36-320 (c), the requirement in the local administrative procedures act of "the time, place, and issues involved," D.C. Code §1-1509 (a), and DOES' own regulations requiring furnishing of the prehearing statement form to "each of the interested parties or their representatives," DCMR §222.1, the petitioners did not receive notice, "actual" or otherwise, of the prehearing

conference.

The lower court also determined that petitioners "had advance knowledge of the formal hearing," in apparent reference to a letter sent to petitioners' counsel from claimant's attorney, dated November 16, 1988, merely stating that a hearing on "ex parte proof" was scheduled for January 11, 1989 (CX 6; HR 6). The agency itself provided petitioners with no copy of the prehearing order to that effect (HR 12, 24, Appx. 39). In fact, the agency sent no notice of any kind or correspondence notifying petitioners of the scheduling of a hearing in January 1989, let alone any particulars as to the issues, rulings, or evidence which would be involved (HR 24). Up to the day of the actual hearing, in fact, with the sole exception of the misdirected prehearing notice, the agency

made no effort to contact petitioners, either in writing or by telephone. With only a brief letter from claimant's counsel upon which to rely, with no prehearing order or other communication from the agency apprising them of the proceedings and providing even minimal particulars, the lower court's finding of petitioners' "advance knowledge of the formal hearing" seems a strained characterization.

The lower court also held that petitioners had "fully participated" in the hearing, slip op. 2,5 (Appx. 2-3). Petitioners' ability to "participate" was essentially short-circuited by the agency's conduct before the hearing. Having received from the agency no notice or contact of any kind, petitioners initiated a three-way telephone conference

with the hearing examiner and claimant's attorney on Monday, January 10, 1989 after the hearing examiner had telephoned only the claimant's attorney on the previous Friday (HR 6,7). The hearing examiner reiterated his decision to proceed with a hearing the following day on ex parte proof (HR 7; Appx. 38). After the hearing had begun the next day, the hearing examiner formally denied petitioners' request for postponement based on defective notice, but did finally provide a copy of the prehearing order and claimant's prehearing statement to petitioners (HR 27) and announced sua sponte that he would allow petitioners to offer evidence, reversing the ruling he had restated only the previous afternoon (HR 23-25; Appx. 39-40).

Under these circumstances, petitioners had no evidence at hand to offer. The agency had ruled that petitioners could offer no evidence, a sanction the agency imposed upon petitioners for their nonappearance at a prehearing conference of which they had not been notified, reiterating this ruling as recently as the late afternoon of the day before the hearing (HR 7).

This Court has held that "a requirement of actual notice...is not so cumbersome as to unduly hinder the dispatch with which ...proceedings are conducted" as to known or reasonably ascertainable probate creditors, noting that in "analogous situations we have rejected similar arguments that a pressing need to proceed expeditiously justifies less than actual notice," Tulsa Professional Collection

Services v. Pope, 485 U.S. 478, 490 (1988). Arguably, the perceived need to address promptly the merits of a workers' compensation claim requires expeditious proceedings, but surely this policy concern cannot constitutionally justify the imposition of a default sanction where the compensation agency has neglected to provide actual notice to the parties affected. Modifying this sanction, only after the hearing had actually begun, was a hollow gesture. Petitioners had no witnesses at hand to offer and, with the sole exception of a wage earning statement (EX 1), no documents to introduce. While it is true, in a literal sense, that petitioners had the opportunity to cross-examine the claimant, the agency's failure to provide any specific notification as to the substantive issues and procedural

rulings involved in the hearing, and its denial of a postponement, crippled any meaningful opportunity to prepare for effective cross-examination.

The lower court "perceive[d] no prejudice in this case arising from the defective notice," slip op. 5 (Appx. 11). Petitioners, as noted, had no actual notice of the prehearing conference and their "advance knowledge" of the pending hearing was de minimis and secondhand. The agency's disregard of petitioners' due process rights, however, extended beyond these two specific concerns and worked actual and substantial prejudice to the petitioners.

One key issue before the agency, for example, was whether jurisdiction lay in the District of Columbia. The workers' compensation act in the District allows

compensation only where "at the time of such injury...employment is principally localized in the District of Columbia..." D.C. Code §36-303 (a). Cross-examination of the claimant suggested that the claimant's employment was not "principally localized" in the District, but rather that he had spent the majority of his brief employment tenure in Maryland and Virginia. Petitioners were unable to offer evidence to help confirm this suggestion, however, because they had been informed, as recently as the afternoon before the hearing, that they would be barred from offering evidence (HR 7).

> Q. And now, the job that you had in Herndon, you were actually out there working for 39 hours, Isn't that correct? (HR. 79-80)
>
> A. I'm not--in Herndon? I'm not sure to be honest with you.
>
> Q. Well, the job that you did at 444 North Capitol, that

actually only involved four days work, isn't that so?

A. It's been two years ago. I'm not really sure of the dates exactly...

EXAMINER SEYMOUR:...Just as a point of reference for myself, Mr. Whiting, have you--does the Employer have daily time cards or time records showing what hours?

Mr. Whiting: Yes, they do, Your Honor...I don't have his records with me.

EXAMINER SEYMOUR: I understand, okay.

BY MR. WHITING:

Q. So, if I were to suggest to you that you put in 28 hours in Washington for the North Capitol Street job, 26 at the job in Rockville and 39 in Herndon, that would be correct? (HR 80-81)

A. I'm not sure...

Q. And for that full job you were working out in Herndon, counting that day of the injury, that would have been five days. Isn't that correct?

A. I'm not even sure. Like I said, it's been two years. (HR 82)

(Emphasis supplied.)

Thus, on the pivotal issue of jurisdiction, the agency's conduct in its prehearing rulings, as to ex parte proof, deprived petitioners from having evidence available to address the controversy effectively. Only the afternoon before, the hearing examiner had insisted that the hearing would be on an ex parte basis, rendering worthless any evidence petitioners might otherwise have had available. The hearing examiner's inquiry as to the existence of the employer's time records, and the use of specific number of hours worked in each jurisdiction in cross-examination (numbers which the claimant could not naysay) (HR 79-81), show that the agency's prehearing rulings deprived the petitioner of having available such material records to offer

into evidence.

The lower court opined that, after receiving a letter from claimant's attorney in November, 1988, "nearly two months passed in which petitioners could have notified the hearing examiner that the notice of the prehearing conference had been sent to an attorney who did not then represent them and could have contested the ex parte format set for the hearing. At the very least, petitioners could have requested a continuance or availed themselves of the opportunity to prepare for the hearing," slip op. 3-4 (Appx. 7). This reasoning overlooks several crucial circumstances.

First, if the agency was continuing to view the attorney who at that time had been erroneously designated as petitioners' "representative" as actually

acting in that capacity (HR 11, 18), the petitioners reasonably could have expected service of a copy of the prehearing order or some other agency notice (as both the governing statute and regulations required) to which they could respond. Second, if as claimant's attorney had apprised them, a hearing indeed was to be held, petitioners reasonably expected personal service of a hearing notice, required by D.C. Code §36-320 (c), which would at least meet the minimal requirements of the local administrative procedure act as to "the time, place and issues involved," ibid., §1-1509 (a), so that a proper response might be filed. Without such notice, petitioners simply had no meaningful "opportunity," in the lower court's words, "to prepare for the hearing." Indeed, in the continuing

absence of such notice to petitioners, they caused the agency files to be searched, without success, to ascertain the status of the agency proceedings (HR 12-13). Petitioners maintained contact with claimant through counsel, maintaining their position that, without further information, they would be requesting a postponement to allow reasonable opportunity to prepare (HR 14). Still having received no notice or other correspondence from DOES and no prehearing statement from the claimant, petitioners did in fact request a continuance, both on January 10 and January 11, 1989 (HR 7, 23-25).

The lower court's conclusion that petitioners could have "availed themselves of the opportunity to prepare for the hearing" also overlooks the fact that the

only information available to petitioners, which was provided by the one letter from claimant's attorney, was to the effect that the employer would be barred from offering evidence. In petitioners' only actual contact with DOES before the hearing, on the previous afternoon, the hearing examiner had specifically confirmed his previous rulings that the hearing would proceed "on ex parte proof." Had the examiner then ruled instead that, under the circumstances, he might consider allowing petitioners to present evidence, they would have had some opportunity to have witnesses and other evidence available the following morning for the hearing, and the prejudice caused by lack of notice could have been somewhat alleviated.

However, the agency failed to provide petitioners with the required notice and the examiner expressly barred petitioners from presenting any evidence at the formal hearing, reversing his position only after the onset of the hearing itself. Therefore, petitioners were effectively deprived of their constitutional rights under the due process clauses of the 5th and 14th amendments to the United States Constitution.

Conclusion

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The efforts (or lack of them) of DOES to notify the petitioners of proceedings at which significant interests were at stake hardly appear reasonably calculated to afford them any opportunity to be heard. First, DOES directed a prehearing notice to a nonrepresentative of petitioners. The lower court acknowledges that the sole person to whom this notice was sent did not represent

petitioners, slip op. 3 (Appx. 3-4). Second, when no one appeared on petitioners' behalf at the conference, the hearing examiner not only made no attempt to contact petitioners, he had apparently forbidden claimant's attorney from attempting such contact, not once, but three times (CX 3). Third, the agency then failed to direct any notice of the prehearing rulings, oral or written, or even bare notice of the scheduling of a hearing, to the petitioners.

The agency had issued a prehearing order, on November 15, 1988, designating such matters as facts deemed to be uncontested, discovery to be allowed, exhibits to be offered, and witnesses and prospective testimony. However, the agency failed to serve the petitioners with this order until the formal hearing

already was in process on January 11, 1989, at which time the agency also provided for the first time a copy of claimant's prehearing statement (HR 27). The agency neither provided a copy of these crucial particularizations of issues and rulings nor even made petitioners aware of their existence until the actual hearing, in violation of the plain requirements of the governing statutes and regulations and due process dictates.

Finally, the agency denied both informal and formal requests by petitioners for a continuance and ruled sua sponte that it would rescind the ex parte ruling reiterated only hours earlier, a gesture of no practical benefit to petitioners, under the circumstances. It would be difficult, in sum, to construct a method better calculated to deny a reasonable

opportunity to be heard.

This Court has said in various settings that reversible error from a federal agency's failure to comply with its own rules and procedures requires a party to show resulting prejudice, e.g., Morton v. Ruiz, 415 U.S. 199, 213 (1974). In the case at bar, the failure of DOES to adhere to its own regulations went hand in hand with its neglect of fair, adequate, or meaningful notice to petitioners, resulting directly in their being deprived of the opportunity to attend the prehearing conference, to learn the particulars of the claim made against them, to obtain specific information about the issues to be heard affecting their interests, and to prepare for, and participate meaningfully in, the hearing affecting their substantial interests.

Because the issue of the applicability of constitutional due process to adequacy of notice in non-federal administrative proceedings, particularly where the agency substantially breaches its own governing statute and applicable regulations, is a matter of substantial importance to the public, as well as to petitioners here, they respectfully ask this Court to issue its Writ of Certiorari to the District of Columbia Court of Appeals, to the end that the judgment below may be reversed and vacated, with instructions to the lower court to direct DOES to grant petitioners a new hearing.

Respectfully submitted,

W. Stanwood Whiting
Counsel for Petitioners
DIRSKA & LEVIN
7135 Minstrel Way
Suite 302
Columbia, Maryland 21045
(301) 621-8855

DISTRICT OF COLUMBIA
COURT OF APPEALS

NO. 90-1230

REGIONAL CONSTRUCTION COMPANY, et al.
PETITIONERS

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT

MICHAEL D. BAKER, INTERVENOR

Petition for Review of a Decision of the District of Columbia Department of Employment Services

(Argued November 14, 1991 Decided December 20, 1991) Judgment rendered December 20, 1991

W. Stanwood Whiting for petitioner.

Amy L. Epstein for intervenor.

John Payton, Corporation Counsel, Charles L. Reischel, Deputy Corporation Counsel, and Lutz Alexander Prager, Assistant Deputy Corporation Counsel, filed a statement in lieu of brief for respondent.

Before Rogers, Chief Judge, Terry, Associate Judge, and Pryor, Senior Judge.

Terry, Associate Judge: Michael Baker injured his back and leg in January 1987 when he fell while working as a carpenter for Regional Construction Company. A hearing examiner for the Department of Employment Services (DOES) awarded disability benefits to Baker, and on appeal the Director of DOES affirmed that order. Regional and its insurance carrier, Hartford Accident and Indemnity Company, now seek review of the Director's decision, contending that they did not receive notice of the hearing on Baker's claim in the manner prescribed by statute. We hold that because petitioners in fact had almost two months' actual notice of the hearing

and fully participated in it, they were not prejudiced by the admittedly defective notice sent to DOES. We therefore affirm the Director's decision.

In August 1987 Baker applied for disability benefits under the workers' compensation statute, D.C. Code § 36-303 (1988). His counsel filed a request for formal hearing on September 22, 1988, pursuant to D.C. Code § 36-320 (c), and listed W. Stanwood Whiting on the form as the carrier's attorney.[1] On October 7 DOES mailed to Baker and to Whiting a

[1]Mr. whiting was then representing petitioners in connection with a disability claim that Baker had previously filed in Maryland involving the same injury.

notice of a pre-hearing conference scheduled for November 15. At that time, however, neither Mr. Whiting nor his law firm had been retained to represent the carrier in the District of Columbia proceedings on Baker's claim. Consequently, although Baker's attorney appeared at the November 15 conference, no one was there to represent petitioners (the employer and the carrier). Because of their failure to send a representative to the conference, the hearing examiner set a hearing for "ex parte proof" on January 11, 1989.

At the January 11 hearing, petitioners were represented by counsel, who introduced evidence and cross-examined Baker, the sole witness.

Following the hearing, the examiner issued a compensation order awarding Baker total disability benefits from the date of the accident through the present and continuing. On an administrative appeal the Director of DOES affirmed that order.

Petitioners ask this court to reverse the Director's decision on the ground that they did not receive "fair and adequate notice" of the formal hearing in January 1989 on Baker's claim. D.C. Code § 36-320 (c) provides that DOES "shall give the claimant and other interested parties at least 10 day notice of [a formal] hearing, served personally upon the claimant and other interested parties or sent to such

claimant and other interested parties by registered mail or certified mail ...." This was not done. As the hearing examiner stated, there was no indication in the record that "any notice ... was sent out subsequent to the pre-hearing conference on November 15, 1988, advising Employer's counsel, or Claimant's counsel for that matter, that the matter was being set down for ex parte proof."

Petitioners claim that they were prejudiced by the defective notice because they were unable to present evidence of the issue of whether the District of Columbia had jurisdiction over Baker's claim. At the hearing below, however, their counsel conceded

that he had received notice of the pre-hearing conference as well as a letter from Baker's attorney dated November 16, 1988, stating that a hearing on ex parte proof was scheduled for January 11, 1989. Counsel also admitted that he had been retained no later than November 16, 1988. Thus nearly two months passed in which petitioners could have notified the hearing examiner that the notice of the pre-hearing conference had been sent to an attorney who did not then represent them and could have contested the ex parte format set for the hearing. At the very least, petitioners could have requested a continuance or mailed themselves of the opportunity to prepare for the hearing. They did none of these things. Petitioners' counsel did,

however, attend the January hearing, where he cross-examined Mr. Baker and introduced evidence on his clients' behalf.

If the formal hearing had in fact been limited to ex parte proof by Mr. Baker, without any involvement by petitioners' counsel, this would be a different case. But that did not happen. Instead, the hearing examiner allowed Mr. Whiting to participate fully in the proceedings, despite his absence from the pre-hearing conference indeed, the examiner denied a motion by Baker's counsel to proceed "under the rules of ex parte proof" in accordance with the earlier order. Consequently, even though the notice of the hearing was

defective, we fail to discern any prejudice resulting from the defect. Simply put, any error arising from the faulty notice was harmless.

Petitioners also assert that the District of Columbia did not have jurisdiction over Baker's claim because his employment at the time of the injury was not "principally localized" in the District, as required by D.C. Code § 36-303 (a) (1988). We hold, to the contrary, that there was such jurisdiction. See D.C. Code § 1-1510 (a) (3) (E) (1987).

Finally, petitioners ask us to remand the case so that they may offer additional evidence, "particularly on

the issue of jurisdiction." We deny this request. Although petitioners assert that they have records in their possession showing he number of hours worked by Baker in the District of Columbia, they have not shown, either here or before DOES, that "such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence" at the hearing. D.C. Code § 36-322 (b) (3) (1988). We note also that petitioners never asked the hearing examiner to keep the record of the hearing open after January 11 so that they might submit such evidence.

We do not condone DOES's conduct in failing to comply with statutory

requirements for notifying the parties of the formal hearing. In some other case, such a failure may well result in reversal. Here, however, because petitioners received actual notice of the pre-hearing conference, had advance knowledge of the formal hearing, and participated in it, we perceive no prejudice in this case arising from the defective notice.

Affirmed.

MICHAEL D. BAKER *

Claimant *

v. * Government of the District of Columbia

REGIONAL CONSTRUCTION * Director,
COMPANY, Department of
and * Employment Services

THE HARTFORD ACCIDENT * Dir. Dkt. No. 89-18
and INDEMNITY COMPANY,

Employer/Carrier * Issued September 10 1990

* * * * * *

Appeal from the Compensation Order of Douglas A. Seymour, Hearing Examiner

Daniel S. Willard, Esquire
for the Claimant

W. Stanwood Whiting, Esquire
for the Employer/Carrier

DECISION OF THE DIRECTOR

I. Preliminary Statement

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended,

D.C. Law 3-77, D.C. Code, §36-301 et seq. (1981 Edition, as amended) (Hereinafter, the "Act").

On February 16, 1989, Hearing Examiner Seymour issued a Compensation Order awarding claimant temporary total disability benefits from January 5, 1987 through March 31, 1988 and from April 5, 1988 through the present and continuing plus interest, based on an average weekly wage of $600.00.

Employer filed an Application for Review March 20, 1989. Claimant filed a response to the appeal on April 6, 1989.

II. Background

A Pre-Hearing Conference was held in this case on November 15, 1988, but employer's counsel failed to appear, and thus, the case was scheduled for ex parte proof on January 11, 1989. On January 9, 1989, the Hearing Examiner initiated a conference call between counsel for both parties, and the Hearing Examiner instructed counsel that the matter would proceed as previously schedule for ex parte proof.

At the formal hearing, on January 11, 1989, employer's counsel requested a continuance so he could participate in a later formal hearing. Although employer's motion was denied, employer was allowed to participate in the hearing because a review of the

administrative file revealed that no order scheduling the case for ex parte proof had been issued after the pre-hearing conference.

Claimant injured his left knee and back on January 5, 1987. Claimant received compensation benefits due to the filing of a Maryland workers' compensation claim, but he has not returned to work except for four days in April 1988. At the hearing, claimant sought continuing benefits under the District of Columbia Act.

The Hearing Examiner concluded that claimant's employment was principally localized in the District and thus, the claim fell within the jurisdiction of

the Act. In addition, the Hearing Examiner concluded that although claimant received benefits under the workers' compensation statute of Maryland, he was not barred from pursuing benefits under the Act. Finally, the Hearing Examiner concluded that claimant had been temporarily and totally disabled since January 5, 1987 except for the period from April 1 through April 4, 1988.

Employer appeals asserting: (1) that the Hearing Examiner erred in proceeding with the formal hearing in the absence of requisite statutory notice; (2) that the conclusion that claimant's employment was principally localized in the District was

unsupported by substantial evidence and (3), that the Hearing Examiner erred in concluding that the Employer had voluntarily paid Maryland benefits under Russell v. W.M.A.T.A., H&AS No. 84-358 (June 30, 1986).

III. Discussion

The Director of the Department of Employment Services (hereinafter, "Director") must affirm the Compensation Order under review if the findings of fact contained therein are supported by substantial evidence in the record considered as a whole and if the law has been properly applied. See D.C. Code §36-322; 7 D.C.M.R. Employment Benefits

§230. Substantial evidence is such relevant evidence as a reasonable mind might find as adequate to support a conclusion. George Hyman Construction Company v. Department of Employment Services. 498 A.2d 563 (D.C. App. 1985).

A. Formal Hearing

Employer argues that the Hearing Examiner committed error by proceeding with a formal hearing in the absence of notice, especially where employer was unaware of the pre-hearing conference and had not retained counsel until after the conference. However, after a careful review of the record, the Director must respectfully reject employer's arguments on this issue.

A pre-hearing conference was held in this case on November 15, 1988, however employer's counsel failed to appear and the case was scheduled for ex parte proof on January 11, 1989. On January 9, 1989 a conference call was held between the Hearing Examiner and both counsel, in which the Hearing Examiner instructed counsel that this matter would proceed for ex parte proof as scheduled. On January 11, 1989, employer's counsel requested a continuance so he might participate in a subsequent formal hearing. However, the Hearing Examiner denied the motion, but allowed employer to fully participate in the formal hearing (and submit post-hearing written argument), since the record revealed that no order scheduling

the matter for ex parte proof had been issued to the parties after the pre-hearing conference.

Initially, the Director must point out that the record reveals that employer's counsel acknowledges receiving the pre-hearing conference notice scheduling the pre-hearing conference for November 15, 1988. Hearing transcript pp. 10, 20. However, counsel chose not to appear or respond to the Hearings and Adjudication Section. In failing to appear, employer violated Pre-Hearing Conference Rule VII which provides:

> Failure on the part of counsel to appear at the Pre-hearing

> Conference may result in ex parte dismissal of the case or default or other appropriate sanctions.

In addition, even though the administrative file in this case reveals that no order was issued to the parties scheduling the matter for ex parte proof, employer's counsel acknowledged receiving a letter from claimant's counsel which reads in part:

> "At the pre-hearing conference held on November 15, 1988, the instant matter was set down for "ex parte" proof for January 11, 1989, due to the non-appearance at the hearing of a representative of either the

employer or the insurer."
(Employer's exhibit No. 3).

Despite receiving this letter, there was no response or communication on the part of employer's counsel with the Hearings & Adjudication Section concerning this matter.

The Hearing Examiner explained that the only reason he was not going to enforce the pre-hearing order establishing the matter for ex parte proof, was because apparently no notice was sent to employer's counsel concerning such action. However, the Hearing Examiner noted that it seemed clear that employer's counsel did receive notice of such proceedings,

albeit not formal agency notice. Thus, the Hearing Examiner went forward with the formal hearing and employer was allowed to present evidence and cross-examine witnesses at the proceeding.

The Director must emphasize that after employer's counsel received notice from claimant's counsel on the ex parte proof matter on November 16, 1988, employer's counsel had almost two months to contact the Hearings & Adjudication Section, file motions and prepare any evidence in this matter. Under the circumstances of this case, the Director can not conclude that the Hearing Examiner committed reversible error by proceeding with a formal hearing.

B. Jurisdiction

Employer asserts that the Hearing Examiner's findings that claimant's testimony was credible and that the District has jurisdiction over this case are not supported by substantial evidence. However, the Director concludes that the Hearing Examiner's finding on these matters must be affirmed.

Claimant testified that he was hired through a union hall located in the District and that he worked eight out of his total of twelve working days in the District. In addition, claimant testified that employer failed to advise him of his rights with respect to filing

a workers' compensation claim in the District.

The Hearing Examiner found that employer offered no evidence to rebut claimant's credible testimony that he worked eight of his twelve days in the District, nor did employer rebut claimant's testimony that the place of hire was in the District. Although employer disputes the Hearing Examiner's finding the claimant's testimony was credible on this point, the Director notes that a Hearing Examiner's findings which are based on credibility determination are to be given special weight. Dell v. Department of Employment Services, 499 A.2d 102, 103 (D.C. App. 1985). The Director sees no

reason to disturb the Hearing Examiners findings concerning claimant's credibility.

The Hearing Examiner concluded that under the second prong of Hughes v. W.M.A.T.A., H&AS No. 83-60. (March 6, 1984), aff'd Hughes v. Department of Employment Services, 498 A.2d 567 (D.C. App. 1985), claimant's contact's between the District of Columbia and his employment were substantial than with any other jurisdiction. Accordingly, the Hearing Examiner determined that claimant's employment was principally localized in the District and the District has jurisdiction over the claim.

Under the Hughes test, in determining the location of the employment relationship, one weighs the following factors:

(1) The place(s) of the employer's business office(s) or facility(ies) at which or from which the employee performs the principal service(s) for which he was hired; or

(2) If there is no such office or facility at which the employee works, the employee's residence, the place where the contract is made and the place or performance; or

(3) If neither (1) nor (2) is applicable, the employee's base of operations.

Hughes v. Department of Employment Services, 498 A.2d 567, 569 (D.C. 1985).

The first prong of the Hughes test is not applicable to the instant case, as there is no facility at which or from which claimant performed his principal service, working as a carpenter. As to the second prong, claimant was hired in the District and he worked eight out of his twelve days in the District. As a result, under prong two, the Hearing Examiner concluded that the District has jurisdiction over the claim.

The Director notes that employer did not introduce any evidence, written or oral to contradict claimant's testimony on this issue. As a result, the Director concludes that the Hearing Examiner's finding that the District has jurisdiction over this claim is supported by substantial evidence and must be affirmed.

C. Calculation of Benefits

In the instant case, there was a stipulation between the parties that claimant received benefits as a result of a claim filed in Maryland at the rate of $310.00 per week. Russell v. W.M.A.T.A., H&AS No. 84-358 (June 1986), established a three prong test where an employer has made voluntary payments of

compensation under the laws of another jurisdiction. If this test is not met, an employee is not barred from pursuing benefits under the District of Columbia Act. Russell states:

> "At the very least, whenever an employee has been voluntarily paid benefits under the laws of another jurisdiction, an employer who has made voluntary payments of compensation benefits should show that an employee was informed of (1) the jurisdiction under which he was being paid, (2) the right to receive benefits under District law if the employment was principally localized in the District at the time of the injury and (3) the

extinguishment of any rights to District benefits upon acceptance of payments under the laws of another jurisdiction. Obviously, no such showing would be required where payments are made pursuant to an award."

In reviewing the record of this case, the Hearing Examiner determined that the uncontroverted and credible testimony of claimant established that he was not advised of his rights pursuant to the test established in Russell. Therefore, the Hearing Examiner found that claimant was not barred from pursuing his benefits under the Act.

Employer argues that this finding in incorrect, claiming that there is no evidence that claimant had been "voluntarily" paid benefits under the law of Maryland. Employer contends that the stipulation which was entertained and accepted by the Hearing Examiner was merely to the effect that benefits had been paid in Maryland. However, after a complete review of the record, the Director concludes that the arguments advance by employer must be rejected.

The record in this case indicates that the parties entered into a stipulation that claimant received payments in Maryland. Concerning this issue there is not evidence in the record indicating that the payments made

by employer were not voluntarily made. Employer points out language in correspondence which it contends demonstrates that these were not voluntary payments, however, this language only indicates that the claim was being contested in Maryland. The fact that the claimant was contesting issues in Maryland does not indicate that the claim was not voluntarily paid. The issue is not that the claim was being contested, but whether the payments were voluntary. There is no evidence in the record of any order or award from Maryland mandating payment of benefits to claimant.

The Director must decide whether there is substantial evidence in the

record to support the Hearing Examiner's findings. In this case, the record does not reveal any evidence that the payments were not voluntary. Thus, the Director concludes that the Hearing Examiner's finding that claimant's receipt of voluntary payments does not bar him from collecting benefits under the Act is supported by substantial evidence in the record.

V. Disposition

Accordingly, for the reasons more fully set forth above, the Compensation Order of February 16, 1989 is hereby affirmed, adopted, and incorporated by reference herein.

Signed _____
F. Alexis H. Roberson
Director

Date: September 10, 1990

In the Matter of Michael D. Baker	*	Government of the District of Columbia
Claimant	*	
v.	*	Department of Employment Services
Regional Construction Company	*	
and	*	Hearings and Adjudication Section
The Hartford Accident and Indemnity Company	*	H&AS No. 88-235A
Employer/Carrier		

Issued: February 16, 1989

Appearances:

Daniel S. Willard, Esquire

For the Claimant

W. Stanwood Whiting, Esquire
for the Employer/Carrier

Before:

Douglas A. Seymour, Esquire
Hearings and Appeals Examiner

COMPESATION [SIC] ORDER

Statement of the Case

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code 1981, Section 36-301 et seq. (hereinafter, Act).

After timely notice, a full evidentiary hearing was held on January 11, 1989 before Douglas A. Seymour, Hearings and Appeals Examiner. Michael D. Baker (hereinafter, claimant) appeared in person and by counsel. The Employer/Carrier (hereinafter, employer) appeared by counsel. Claimant testified on his own behalf. Claimant's Exhibit Nos. 1-3 and Employer's Exhibit No. 1 (described in the hearing transcript at

pages 27-29) were entered into evidence. The following abbreviations will be used in citation to the record: CX-Claimant's Exhibit, ERX-Employer's Exhibit, and HT-Hearing Transcript. The record closed upon the conclusion of the hearing.

Relief Requested by the Parties

Claimant is seeking an award under the Act for temporary total disability benefits from January 5, 1987 through the present and continuing with the exception of the period April 1, 1988 through April 4, 1988. Claimant is also seeking the payment of all related medical expenses. Employer is seeking a credit for the compensation benefits previously paid claimant, at the

compensation rate of $310.00, as a result of a claim filed in the State of Maryland.

Procedural History

A Pre-Hearing Conference was held in this matter on November 15, 1988. However, employer's counsel failed to appear and accordingly, the matter was set down for Ex Parte proof on January 11, 1988. On January 9, 1989, a conference call initiated by the undersigned was held between both counsel and the undersigned, at which time, after entertaining argument from both parties, I instructed counsel that the matter would proceed as previously noted for Ex Parte Proof.

The Formal Hearing commenced on January 11, 1989, at which time employer's counsel requested a continuance, so that he might fully participate in a subsequent Formal Hearing. Claimant's counsel objected to this continuance motion. However, a review of the administrative file revealed that no order setting the matter down for Ex Parte Proof had been issued to the parties subsequent to the Pre-Hearing Conference. Accordingly, although employer's motion for a continuance was denied, employer was allowed to fully participate in the hearing which then

proceeded in the usual manner. HT at 9-24 [2]

Background

Claimant, a carpenter, injured his left knee and back when he fell and landed on scaffolding on January 5, 1987. While claimant has received compensation benefits as a result of filing a Maryland claim, he has not, except for four days in April of 1988, returned to

---

[2]Although the record closed upon the conclusion of the hearing, Employer's counsel was granted leave to submit post-hearing written argument no later than January 23, 1989, on Dr. Magee's progress notes dated September 7, October 26 and December 14, 1988 and on a December 16, 1988 disability slip as they were not produced until the day of the formal hearing. HT at 92-93. Employer's written arguments were received on January 23, 1989.

work and is now seeking continuing benefits under this Act.

Issues

1. Jurisdiction

2. The nature and extent of claimant's disability, if any.

3. Whether certain medical expenses are causally related to claimant's injury of January 5, 1987.

Finding of Fact

The parties stipulated, and I so find, the following:

1. There is an employer/employee relationship under the Act.

2. The date of injury was January 5, 1987.

3. The claim was filed on August 27, 1987.

4. Claimant received temporary total disability benefits as a result of a claim filed in the State of Maryland for the periods January 6, 1987 through April 30, 1987 and from September 8, 1987 through March 31, 1988.

5. The compensation rate for the benefits paid through the State of Maryland was $310.00.

I. Jurisdiction

Claimant testified, and I so find, that he was hired through the union hall located in the District of Columbia. Claimant further testified, and I so

find, that he worked only four of his total of 12 days outside of the District of Columbia and the remaining eight days inside the District of Columbia. Based on the claimant's credible testimony, I find that his employment was principally localized in the district of Columbia. HT at 42, 43, 48, 82, 84. Claimant further testified, and I so find, that employer failed to advise him of his rights with respect to filing a workers' compensation claim in the District of Columbia. HT at 55, 56. Based on this credible and unrebutted testimony, I find that claimant is not estopped from pursuing his claim under the Act.

II. The nature and extent of claimant's disability, if any.

Claimant testified, and I so find, that he was unable to return to his usual occupation when he attempted to do so for four days in April of 1988. Claimant further testified, and I so find, that he has not worked, with that one four-day exception, since the date of the accident. HT at 63-65. A review of the medical records, progress notes and disability slips for the period January 12, 1987 through December 14, 1988, of Dr. Christopher M. Magee, claimant's treating orthopedic surgeon, establish that, except for the one period in April of 1988, at no time has claimant been released to return to his usual occupation. While Dr. Magee does note in his December 14, 1988 progress note

Findings of Fact Continued:

that he has encouraged claimant to seek light-duty work, no evidence was offered by employer to show that any offers of suitable light-duty work have been made to the claimant. Accordingly, based on the unrebutted reports of Dr. Magee and claimant's credible testimony, I find that claimant has remained, except for the period April 1 through April 4, 1988 and continues to be, totally disabled from his usual occupation since his work-related injury of January 5, 1987. HT at 63-65, CX-1.

3. Whether certain medical expenses are causally related to claimant's injury of January 5, 1987.

I find, based on a thorough review of the evidence contained in Claimant's Exhibit No.2, that the disputed medical bills are causally related to claimant's work-related injury of January 5, 1987.

Discussion

In first addressing the issue of jurisdiction, I find that employer offered no evidence to rebut claimant's credible testimony that he worked eight of his twelve days in the District of Columbia, nor did employer rebut claimant's testimony that the place of hire was likewise in the District of Columbia. HT at 80, 81. Therefore, under the second prong of Hughes v. Washington Metropolitan Area Transit Authority, H&AS No. 83-60; OWC No. 7116

(March 6, 1984), aff'd sub nom. Hughes v. DOES, 498 A.2d 567 (D.C. 1988), I find that claimant's contacts between the District of Columbia and his employment were more substantial than with any other jurisdiction. Accordingly, claimant's employment was principally localized in the District of Columbia and, pursuant to D.C. Code 1981, Section 36-303 (a), his claim falls within the jurisdiction of the Act.

I next address the additional jurisdiction issues raised by the stipulation that claimat [sic] received voluntary payments of compensation as a result of a claim filed in Maryland. In an Order Remanding Russell v. Washington

Metropolitan Area Transit Authority, H&AS No. 84-358, (June 30, 1986) the Director set forth the following three-prong test in cases where an employer has made voluntary payments of compensation under the laws of another jurisdiction:

Discussion Continued:

"At the very least, whenever an employee has been voluntarily paid benefits under the laws of another jurisdiction, an employer who has made voluntary payments of compensation benefits should show that an employee was informed of (1) the jurisdiction under which he was being paid, (2) the right to receive benefits under District law if the employment was principally

localized in the District at the time of injury and (3) the extinguishment of any rights to District benefits upon acceptance of payments under the laws of another jurisdiction. Obviously, no such showing would be required where payments are made pursuant to an award."

Should it then be found that all three prongs of this test were met, the Director went on to hold that a claimant could not receive benefits in this jurisdiction since he had received benefits under the law of another jurisdiction pursuant to the holding in Ringgold v. Safeway Stores, H&AS No. 83-157, OWC No. 0015214 (January 24, 1985). The uncontroverted and credble [sic] testimony of the claimant of the instant

case extablishes [sic] that claimant was not advised of his right pursuant to the third prong as set forth in Russell. Therefore, claimant is not barred from pursuing his benefits under the Act.

Finally, concerning the nature and extent of claimant's disability, employer offered no medical evidence to rebut claimant's credible testimony and the substantial medical records of claimant's treating physician, Dr. Magee. Nor for that matter, did employer offer into evidence any evidence to dispute claimant's contention that the medical expense contained in Claimant's Exhibit No. 2 are causally related to the work-related of January 5, 1987. Accordingly, I find

that claimant has remained temporarily and totally disabled since January 5, 1987 except for the period April 1 through April 4, 1988.

Conclusions of Law

I conclude that claimant's employment was principally localized within the District of Columbia and that, therefore, this claim fall within the jurisdiction of the Act. I further conclude that claimant's receipt of benefits pursuant to a Maryland claim does not bar him from collecting benefits under this Act. Next, I conclude that claimant has been temporarily and totally disabled from January 5, 1987 through March 31, 1988 and from April 5, 1988 through the

present. Finally, I conclude that the disputed medical expenses are causally related to claimant's work-related injury of January 5, 1987.

Order

Employer shall pay claimant the following:

1. Temporary total disability benefits from January 5, 1987 through March 31, 1988 and from April 5, 1988 through the present and continuing plus interest, based on an average weekly wage of $600.00.[3]

---

[3]Employer of course is entitled to a credit for the benefits paid to claimant pursuant to the Maryland claim.

2. All disputed and undisputed related medical expenses pursuant to my findings of fact contained hereinabove.

IT IS SO ORDERED.

Signed _____
Douglas A. Seymour, Esquire
Hearings and Appeals Examiner
Dated: February 16, 1989

(2)

Supreme Court, U.S.
FILED
MAY 29 1992
OFFICE OF THE CLERK

No. 91-1762

In The

Supreme Court of the United States

October Term, 1991

REGIONAL CONSTRUCTION COMPANY, et al.,

Petitioners,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF FOR INTERVENOR MICHAEL D. BAKER IN OPPOSITION

MORRIS KLETZKIN
AMY L. EPSTEIN
FRIEDLANDER, MISLER, FRIEDLANDER,
SLOAN & HERZ

1101 17th Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 872-0800

Counsel for Intervenor
Michael D. Baker

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12

QUESTION PRESENTED

Did the District of Columbia Court of Appeals err in ruling that the petitioners had suffered no prejudice notwithstanding the District of Columbia Department of Employment Services' technically defective notice of a formal hearing in a workers' compensation case, where petitioners had received *actual* notice of a pre-hearing conference, had advance knowledge of a formal hearing, and participated in the formal hearing?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

THE PETITION SHOULD BE DENIED 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) 7

Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306 (1950) 5, 7

Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988) 5

Walker v. Hutchinson City, 352 U.S. 112, at 115 (1956) 7

No. 91-1762

In The

Supreme Court of the United States

October Term, 1991

REGIONAL CONSTRUCTION COMPANY, et al.,

Petitioners,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The
District Of Columbia Court Of Appeals

BRIEF FOR INTERVENOR MICHAEL D. BAKER IN OPPOSITION

INTRODUCTION

This case presents the question of whether the petitioners were denied due process of law by the District of Columbia's Department of Employment Services' technically deficient notice to them of a pre-hearing conference in a workers' compensation case where the attorney whom the petitioners retained one day after the pre-hearing conference had received notice of the pre-hearing conference, had received notice of the date of the formal hearing nearly two months in advance thereof, and the petitioners were allowed to fully participate in the formal

hearing including the submission of evidence. The decision below is a correct application of the doctrine of harmless error and raises no novel question warranting plenary review by this Court.

STATEMENT OF THE CASE

Intervenor, Michael D. Baker, initially filed a workers' compensation claim for his injuries of January 5, 1987 in the State of Maryland. Petitioner, The Hartford Accident and Indemnity Company, voluntarily paid him workers' compensation benefits for a period of several months in connection with his Maryland claim. Petitioner' counsel, the law firm of Dirska & Levin and attorney W. Stanwood Whiting, Esquire of that firm represented the petitioners in connection with the Maryland claim from its inception.

Intervenor filed a workers' compensation claim for the same injury in the District of Columbia on or about August 27, 1987.

In February of 1988, intervenor's counsel sent a letter to one of the other attorneys of the firm of Dirska & Levin stating that he believed jurisdiction to lie in the District of Columbia and asking whether the carrier would voluntarily accept jurisdiction in the District of Columbia. Neither the workers' compensation carrier or its attorneys advised intervenor's attorneys that the law firm of Dirska & Levin would not be representing the petitioners in any District of Columbia workers' compensation proceedings.

Throughout a course of correspondence between claimant's attorneys and the law firm of Dirska & Levin, neither the petitioner's attorneys nor the petitioner itself advised intervenor's counsel that Dirska & Levin was not retained in connection with any District of Columbia claim the intervenor might initiate.

When intervenor's counsel filed his application for a formal hearing with the District of Columbia Department of Employment Services, he identified the law firm of Dirska & Levin as counsel for the employer and insurer. W. Stanwood Whiting, Esquire of Dirska & Levin admits receiving this application for a formal hearing yet he did not advise intervenor's counsel that his firm was not the appointed representatives of the petitioners in connection with the District of Columbia case.

The District of Columbia Department of Employment Services sent its notice of a pre-hearing conference to Mr. Whiting and did not send it to either of the petitioners directly. A pre-hearing conference was scheduled for November 15, 1988. Attorney Whiting admits receiving notice of said hearing. On the date of the pre-hearing conference, neither Mr. Whiting nor any other member of his firm nor any representative of the employer or insurer appeared on behalf of the petitioners. No pre-hearing statement was ever filed on behalf of the petitioners.

After the pre-hearing conference at which the Hearing Examiner ruled that the matter would be scheduled for ex-parte proof due to the non-appearance of the employer and insurer, intervenor's counsel contacted Mr. Whiting by telephone and reported what had transpired at the pre-hearing conference and advised that the case

was scheduled for ex-parte proof on January 11, 1989. Intervenor's counsel thereafter confirmed his advice in writing the following day. Mr. Whiting also acknowledges receiving a copy of intervenor's correspondence.

Mr. Whiting and the law firm of Dirska & Levin claim not to have been formally retained by the petitioners until November 16, 1988, one day after the pre-hearing conference, to represent the petitioners' interests in connection with the District of Columbia proceedings. Thereafter, nearly two months elapsed before defense counsel even requested a postponement of the hearing scheduled for January 11, 1989. During this time, defense counsel failed to file any motions or other pleadings seeking either a continuance of the formal hearing or a reconsideration of the Hearing Examiner's decision to set the case for ex-parte proof. Defense counsel failed to avail themselves of the opportunity to conduct discovery nor did they subpoena witnesses for the upcoming hearing.

On the date of the hearing, the Hearing Examiner declined defense counsel's oral request for a continuance but agreed to permit defense counsel to present any evidence he wished and to fully cross-examine the claimant.

Defense counsel presented no witnesses at the hearing but did submit a wage schedule and attachments thereto pertaining to intervenor's employment.

The Hearing Examiner issued a Compensation Order awarding intervenor workers' compensation benefits on February 16, 1989.

The petitioners appealed that Compensation Order to the Director of the Department of Employment Services which office affirmed the Compensation Order. Petitioners then sought review in the District of Columbia Court of Appeals which affirmed the decision of the Director on December 20, 1991. From the Order of the District of Columbia Court of Appeals, the petitioners seek a Writ of Certiorari from this Court.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Petitioners were not denied their due process rights under the circumstances of this case since they had actual notice of a formal hearing, advance knowledge of the date of the formal hearing, and were permitted full participation in the formal hearing.

Petitioners' reliance upon the cases cited in their petition is misplaced. *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950) and *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988) are cases involving the issue of whether notice by publication sufficed for beneficiaries of a trust and creditors of an estate, respectively. In the case at bar, the petitioners are not challenging any statutes or regulations regarding the form of notice which must be given. Also, unlike the beneficiaries and creditors in the *Mullane* and *Tulsa* cases, the petitioners received *actual* notice of the hearing in question.

In the instant case, the attorney whom the petitioners eventually retained to represent them received the notice

of the pre-hearing conference. In the District of Columbia, no adjudications of compensability or of any other issues are made at the pre-hearing conference. The pre-hearing conference serves merely to clarify the issues to be adjudicated at the formal hearing, to apprise all parties of the witnesses and exhibits to be presented by the other party at the formal hearing, to set a cut-off date for discovery and to schedule a formal hearing date mutually agreeable to the parties and to the Hearing Examiner.

Although defense counsel received notice of the pre-hearing conference in advance thereof and had sufficient time to notify the petitioners of it, no one appeared at the pre-hearing conference on behalf of the petitioners.

No adjudication on the merits took place at this pre-hearing conference. On November 16, 1988, the day after the pre-hearing conference, petitioners' counsel received actual notice of the fact that the formal hearing was scheduled for January 11, 1989.

Petitioners had ample opportunity to prepare for the formal hearing. Although they could have promptly requested a continuance of the scheduled hearing or contested the Hearing Examiner's initial decision to set the case for ex-parte proof, the petitioners did neither. The only motion filed by petitioners was an oral request for a continuance of the hearing date which was not made until shortly before the hearing.

Notwithstanding the petitioners' failure to promptly request a continuance of the formal hearing or a reconsideration of the ex-parte format, the Hearing Examiner allowed the petitioners to fully participate in the formal hearing. Contrary to the petitioners' assertion, they did

submit evidence at the formal hearing. The petitioners also could have requested that the Hearing Examiner keep the record open post-hearing so that they might submit any additional evidence they deemed appropriate. The petitioners did not avail themselves of this procedure. For all of these reasons, the District of Columbia Court of Appeals found that the petitioners suffered no prejudice as a result of any defective pre-hearing notice and any error arising therefrom was harmless.

The instant case is also distinguishable from *Armstrong v. Manzo*, 380 U.S. 545 (1965) which involved a shifting of the burden of proof in adoption proceedings. In the case at bar, the burden of proof remained upon the intervenor at all times and the formal hearing at which the petitioners were allowed full participation, clearly eliminated any unfairness to the petitioners which might have resulted from the faulty pre-hearing conference notice.

In the case of *Walker v. Hutchinson City*, 352 U.S. 112, at 115 (1956), this Court recognized that in *Mullane, supra*, the Court called attention to the "impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions". This Court stated in *Mullane, supra*:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature

> as reasonably to convey the required information, *Grannis v. Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra,* and *cf. Goodrich v. Ferris,* 214 U.S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. *Id* at 314-315.

In the instant case, the petitioners had actual notice of the formal hearing well in advance thereof and had ample time and opportunity to prepare for the formal hearing and were in fact allowed to participate fully in the formal hearing. There has therefore been no denial of petitioners' due process rights which would warrant this Court's grant of a writ of certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MORRIS KLETZKIN
AMY L. EPSTEIN
Counsel of Record
FRIEDLANDER, MISLER, FRIEDLANDER,
SLOAN & HERZ
1101 17th Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 872-0800

Counsel for Intervenor
Michael D. Baker